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NO. 87-1855

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

V.

RUSSELL A. MUTH, JR., et al,
Respondent
and
CENTRAL BUCKS SCHOOL DISTRICT,
Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT CENTRAL BUCKS SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Whether Congress abrogated the Eleventh Amendment Immunity of the States in enacting the Education for All Handicapped Children Act.

2. Whether, even if the Pennsylvania Secretary of Education's review of the decision of due process hearing officer violated respondent's procedural due process rights, the award of damages other than nominal damages was appropriate?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

STATUTORY PROVISIONS INVOLVED.....vi

SUMMARY OF ARGUMENT.....1

ARGUMENT

I. CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES IN ENACTING THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT.....4

II. EVEN IF THE PENNSYLVANIA SECRETARY OF EDUCATION'S REVIEW OF THE DECISION OF THE DUE PROCESS HEARING OFFICER VIOLATED RESPONDENT-MUTH'S PROCEDURAL DUE PROCESS RIGHTS, THE AWARD OF DAMAGES OTHER THAN NOMINAL DAMAGES WAS INAPPROPRIATE.....22

CONCLUSION.....38

TABLE OF AUTHORITIES

CASES — PAGE

Antkowiak by Antkowiak vs. Ambach, 653 F.Supp. 1405, 1419 (W.D.N.Y. 1987).....18

Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985).....1,4, 5,6,7, 9,11, 18

Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985).....19,36 37

Cain vs. Yukon Public Schools, 775 F.2d 15 (10th Cir. 1985).....36

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978).....2,28, 29,30, 35

Crawford vs. Pittman, 708 F.2d 1028 (5th Cir. 1983).....10,17

David D. vs. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, 475 U.S. 1140, (1986).....17,18

PAGE

Edelman vs. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); reh'g. denied, 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed. 2d 177 (1974).....5,6

E.E.O.C. vs. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed. 2d 18 (1983).....10

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).....5

Fitzpatrick vs. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976).....9

Garcia V. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985).....4

Hall vs. Vance, 774 F.2d 629 (4th Cir. 1985).....35

Hans vs. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 892 (1890).....5

McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985).....35

PAGE

Muth vs. Smith, 839 F.2d 113, (3d Cir. 1988); 646 F.Supp. 280 (E.D. Pa. 1986).....24,27 32,34

Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D. 1982).....10,12 16,17

Pennhurst State School and Hospital vs. Haldeman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 2d 67 (1984).....5

Quern vs. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979).....5

Rose vs. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, 474 U.S. 817 (1985).....3,37

U.S. vs. Union Gas Company, 832 F.2d 1343 (3d Cir. 1987).....7

United States vs. Union Gas, 792 F.2d 372 (3d Cir. 1986).....7

Welch vs. Texas Department of Highways and Public Transportation, 403 U.S. _____, 107 S.Ct. 2941, 97 L.Ed. 2d 389 (1987).....7

Wood vs. Strickland, 420 U.S. 308 (1975)...29

CONSTITUTIONAL PROVISIONS PAGE

U.S. Const. Amend. XI.....4

U.S. Const. Amend. XIV,
Sec. 1.....8

Sec. 5.....1,8,
10,11
21

FEDERAL STATUTES AND REGULATIONS PAGE

Education for All Handicapped Children
Act of 1975, P.L. No. 74-172,
20 U.S.C. Sections 1400-1461.....1

20 U.S.C. Section 1400(B)(9).....10

20 U.S.C. Section 1412.....17

20 U.S.C. Section 1412(1).....12

20 U.S.C. Section 1412(3).....13

20 U.S.C. Section 1412(4).....13

20 U.S.C. Section 1412(6).....13

20 U.S.C. Section 1412(7).....14

20 U.S.C. Section 1413.....17

20 U.S.C. Section 1414(a)(5).....13

20 U.S.C. Section 1415.....14,22

20 U.S.C. Section 1415(a).....12

20 U.S.C. Section 1415(e)(3).....24,25
26,33

PAGE

34 C.F.R. Section 300.2.....17

34 C.F.R. Section 300.513(a).....24,26
33

Rehabilitation Act of 1973 (Section 504)
29 U.S.C. Section 794.....11,17

42 U.S.C. Section 1983.....11,29

STATE STATUTES

PAGE

22 Pa. Code Section 13.32(22).....24,26
33

MISCELLANEOUS

PAGE

S.Conf. Rep. No. 94-168,
94th Cong., 2d Sess. 29, 47,
reprinted in 1975
U.S. Code Cong. & Ad. News
1428, 1440, 1441, 1446, 1448, 1433.....9,10,
12,13,
14,16

SUMMARY OF ARGUMENT

I. Congress has exercised its power under Section 5 of the Fourteenth Amendment in enacting the Education for All Handicapped Children Act, 20 U.S.C. Section 1401 et seq. As such, Congress had the power to abrogate the Eleventh Amendment immunity enjoyed by the States. It is clear that the provisions of the EHA focus directly on state conduct and envisions State responsibility for assuring that all handicapped children receive the free appropriate public education to which they are entitled, Id., S.Conf.Rep. No. 94-168, 1975 U.S. Code Cong. & Ad. News, 1448. The wording of the statute itself as well as the legislative history of the EHA expresses the clear, unambiguous intention of Congress to abrogate the Eleventh Amendment immunity of the States, Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985) and to impose upon the States liability, including

retroactive money damage awards, for violations of the EHA.

II. Even if the review of Respondent-Muth's appeal from the Hearing Officer's decision by the Pennsylvania Secretary of Education violated the Education for All Handicapped Children Act, the award of damages in the form of tuition reimbursement was inappropriate. Further, an award of damages against Respondent-School District was unjustified under the facts of this case.

A prerequisite to the recovery of other than nominal damages must be a showing of actual rather than presumed injury, Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed 2d 252 (1978). Here, Respondent-Muth has made no showing that the deprivation of his due process rights caused him to suffer monetary or emotional damages. Moreover, damages against Respondent-District should not have been awarded

since no action or inaction of Respondent-District caused the deprivation of Respondent-Muth's rights, Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied 474 U.S. 817 (1985).

ARGUMENT

I. CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATE IN ENACTING THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT.

A. Scope of the Eleventh Amendment's Grant of Sovereign Immunity.

The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

By guaranteeing the sovereign immunity of the States, the Eleventh Amendment serves to maintain the constitutionally mandated balance of power between the States and the Federal government, Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 547, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985). Over

the years, the Supreme Court has had many occasions to interpret the scope of the Eleventh Amendment's grant of sovereign immunity to the States.[1] Two principles emerge from the Court's

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[1]In Hans vs. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 892 (1890), this Court held that a state could not be sued in Federal Court by a citizen of another state or a foreign state, or by its own citizen. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908), allowed the Federal Court to issue an injunction requiring state officials to conform their future conduct to the requirements of federal law even though the issuance of an injunction would have an ancillary effect on the state treasury. Edelman vs. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), reh'g. denied 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed. 2d 777 (1974), allowed the issuance of an injunction governing the future conduct of a state official but held that the Eleventh Amendment barred an award of retroactive relief in the form of money damages against the state. See also, Pennhurst State School and Hospital vs. Haldeman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 2d 671 (1984), Quern vs. Jordan, 440 U.S. 332, 99 S.Ct. 1139. In Pennhurst State School and Hospital vs. Haldeman, supra, this Court held that the Eleventh Amendment barred Federal Court jurisdiction of a state law injunction suit against state officials. In a per curiam opinion, this Court decided that a state did not waive its Eleventh Amendment immunity by participating in a federally funded program. See also, Edelman vs. Jordan, supra. More recently, in Atacasdaro State

analysis of the Eleventh Amendment: (1) a state may waive its constitutional immunity; and (2) Congress may abrogate the Eleventh Amendment immunity enjoyed by the States through its exercise of the legislative power granted under Article I of the United States Constitution, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974).

Where a state has consented to suit in Federal Court, the language expressing such a waiver of constitutional immunity must be clear and unequivocal, Edelman, Id. at p. 673. The mere participation in a federally funded program or receipt of federal funds does not establish that a state has consented to suit in federal

Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985), this Court discussed the factors to be reviewed when determining whether Congress, in enacting a particular piece of legislation, intended to abrogate the Eleventh Amendment immunity enjoyed by the States.

court, Atascadero, Id. at p. 246, Welch vs. Texas Department of Highways and Public Transportation, 403 U.S. _____, 107 S.Ct. 2941, 97 L.Ed. 2d 389 (1987).

B. Congressional Abrogation of Eleventh Amendment Immunity.

In determining whether Congress has abrogated the state's Eleventh Amendment immunity,

> The Court has insisted that the statute, when read literally, not merely allows suits against the State, but that it does so with such specificity that it is clear that Congress consciously and directly focused on the issue of State sovereign immunity and chose to abrogate.

U.S. vs. Union Gas Company, 832 F.2d 1343 (3d Cir. 1987) quoting United States vs. Union Gas, 792 F.2d 372 (3d Cir. 1986). It is therefore necessary to examine Congress' intent in enacting the EHA. Measured against the standards set by this Court in determining the

application of Eleventh Amendment immunity to a particular statute, it is clear that Congress intended to abrogate the Eleventh Amendment immunity of the states when it enacted the Education for All Handicapped Children Act (hereinafter EHA).

In drafting the EHA, Congress was acting pursuant to its powers under Section 5 of the Fourteenth Amendment to the U.S. Constitution. Section 1 of the Fourteenth Amendment provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV Sec. 1. Section 5 of that Amendment states as follows:

> The Congress shall have power to enforce by appropriate legislation, the provisions of this Article.

When acting pursuant to Section 5 of the Fourteenth Amendment, Congress can abrogate the

Eleventh Amendment without the States' consent, Fitzpatrick vs. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976); Atascadero State Hospital vs. Scanlon, Id.

The legislative history of the EHA indicates Congress' intent to rely on its Fourteenth Amendment responsibilities and powers to assure all handicapped children and their parents the equal protection of the laws guaranteed by the Fourteenth Amendment. The Senate Committee on Labor and Public Welfare determined that States had primary responsibility to uphold the Constitution of the United States and their own State Constitutions and State laws while recognizing Congress' own responsibility under the Fourteenth Amendment to assure equal protection of the law, S.Rep. No. 94-168, 94th Cong. 1st Sess. 13 Reprinted in 1975 U.S. Code Cong. & Ad. News 1428, 1446. The Senate Committee unequivocally stated:

> It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to

> guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the government to merely establish an unenforceable goal requiring all children to be in school. S.6 takes positive steps to insure that the rights of children and their families are protected. 1975 U.S. Code Cong. & Ad. News 1428, 1433.

From the language of the legislative history, it is easy to discern that Congress intended to support the exercise of its power to abrogate the States' Eleventh Amendment immunity when enacting the EHA, under Section 5 of the Fourteenth Amendment, E.E.O.C. vs. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed. 2d 18 (1983), Crawford vs. Pittman, 708 F.2d 1028 (5th Cir. 1983). Indeed, by the clear equal protection language contained in the EHA's congressional statements and declarations, 20 U.S.C. Section 1400(B)(9), Congress demonstrated its awareness that the EHA was an exercise of its power under Section 5 of the Fourteenth Amendment, Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D. 1982).

The foregoing excerpts from the legislative history shows that Congress was acting pursuant to its authority under the Fourteenth Amendment when it enacted the EHA. We now turn to the question of whether Congress did, in fact, abrogate the States' Eleventh Amendment immunity by the statutory language contained in the EHA.

D. Direct Liability of the States under the EHA.

Unlike other federal statutes passed pursuant to Congress' authority under Section 5 of the Fourteenth Amendment[2], the EHA focuses primarily on the duty of States, not simply state officials or agencies. The statute creates a legal duty on the part of the State

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[2]See 42 U.S.C. Section 1983, The Civil Rights Act of 1964 which applies to "any person" and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (prior to 1986 amendments). See also Atacasdaro State Hospital vs. Scanlon, supra.

and makes the duty judicially enforceable, Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D. 1982). Indeed, the legislative history of the EHA reveals six goals considered of paramount importance to Congress in addressing the rights of handicapped children. Those goals are embodied in the language of the statute. The six express goals as set forth in the legislative history and codified by the terms of the EHA are as follows. First, "the Committee bill requires that the state have in effect a policy that assures all handicapped children the right to free appropriate education." U.S. Code Cong. & Ad. News 1975, 1440. This goal was codified at 20 U.S.C. Section 1412(1). Second, "the bill requires that the state will undertake or has undertaken policies and procedures to assure that a free appropriate public education will be available to all handicapped children..." 1975 U.S. Code Cong. & Ad. News, 1441; see 20 U.S.C. Section 1415(a). Third, the bill requires that the state establish timetables for the provision

of a free appropriate public education to handicapped children, Id.; see 20 U.S.C. Section 1412(3). "Fourth, it requires that the state assure that local educational agencies provide and maintain records of the individualized planning conference for each handicapped child including the statements of all public conferences, and that such conferences will be conducted at least three times a year to develop, review and, with the agreement of the parent or guardian, revise the statement." Id.; see 20 U.S.C. Section 1412(4), 1414(a)(5). "Fifth, the bill requires that the State Educational Agency be responsible for insuring the implementation of and compliance with the provisions of the Act," and that the State be responsible for the general supervision of educational programs for handicapped children whether administered by any other state or a local agency. Id.; See 20 U.S.C. Section 1412(6). "Finally, to insure orderly due process with regard to carrying out the

provisions of the Act and to insure compliance with the provisions of the Act, the committee provides that the State shall establish policies and procedures to provide consultation with persons involved in or concerned with the education of handicapped children including handicapped individuals and parents of handicapped children. Further, in this regard, the State shall establish an entity to assure compliance with the provisions of the Act which shall conduct periodic evaluations and be empowered to receive, and take such necessary steps as are required, to resolve complaints and violations of the requirements of the Act." Id.; see 20 U.S.C. Section 1415, 1412(7).

The unmistakable and unequivocal language of the EHA and its legislative history demonstrates that Congress intended that the States bear full responsibility for implementation and enforcement of the EHA. The Senate Committee Report describing Congress' intention to hold the states strictly liable under the EHA

demonstrates that abrogation of the states' Eleventh Amendment immunity is the only reasonable interpretation of the language of the EHA.

> The Committee Bill requires that the State educational agency be responsible for insuring that all requirements of the Act are carried out, and that all education programs for handicapped children within the State, including all such programs administered by any other State or local agency, must meet State educational agency standards and be under the general supervision of persons responsible for education of handicapped children. This provision is included specifically to insure a single line of responsibility with regard to the education of handicapped children, and to insure that in the implementation of all provisions of the Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency. Under other provisions of the Committee bill, funds paid to a State for other federal programs which provide assistance for the education of handicapped children are required to be utilized by the State in a way which is designed to meet the timetables under this Act and the priorities established for serving handicapped children. The Committee expects that the chief State school officer of the State will take all steps necessary to assure the cooperation of other State educa-

tional agency personnel in carrying out this requirement.

> The Committee considers that establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many states, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of rights of handicapped children is squarely the responsibility of one agency.

1975 U.S. Code Cong. & Ad. News 1428, 1448 (emphasis supplied).

Although the language of the EHA itself does not contain a catch phrase such as "abrogation of Eleventh Amendment immunity of the States" the clear and unmistakable intention of Congress was to impose upon the States liability for "all appropriate relief", Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D.

1982), Crawford vs. Pittman, 708 F.2d 1028 (5th Cir. 1983). Such appropriate relief necessarily includes an award of damages against the State, especially in cases such as the case at bar, where Pennsylvania's policy and procedures violated the requirements of the EHA. "To hold that damages cannot be awarded even when "appropriate" under the Act would be to subvert the clear congressional intent to impose liability on States for "all appropriate relief". Parks v. Pakovic, 536 F.Supp. 296, 309 (N.D. Ill., E.D. 1982).

Moreover, the remedies for violation of the EHA are not directed to "any recipient of federal assistance" as in Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794, but are directed to one class of actors: states and state agencies responsible for providing public education. See, e.g., 20 U.S.C. Section 1412, 1413; 34 C.F.R. Section 300.2, David D. vs. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, 475 U.S. 1140, 106

S.Ct. 1790, 90 L.Ed. 2d 336 (1986); Antkowiak by Antkowiak vs. Ambach, 653 F.Supp. 1405, 1419 (W.D.N.Y. 1987). As the Court of Appeals pointed out in David D., "obviously, since the State is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceedings." David D. vs. Dartmouth School Committee, Id. at 422. To hold that the Eleventh Amendment bars an award of damages, such as tuition reimbursement, against a state which has violated the terms of the EHA, is, in effect, requiring "the federal courts to protect states that violate federal law from the legal consequences of their conduct", Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 258, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985) (Brennan dissent.)

Congress' clear intention in enacting the EHA was to create a harmonious working relationship between the state educational agency, ultimately responsible for the provision of a free appropriate public education, and a local educational agency, involved in the day to day education of the handicapped child. This Court's decisions in EHA cases have interpreted the EHA as allowing for awards of damages against local school districts which violate either the procedural or substantive requirements of the Act, Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985). To now hold, under the facts of this case, that the local school district, which at all times had available an appropriate program of education for the handicapped child, is accountable for a state's failure to implement properly the EHA's procedural due process requirements, would discourage the establishment of a harmonious

relationship between state and local educational agencies. Indeed, imposition of damages against the Central Bucks School District in this case, provides no incentive to the Commonwealth of Pennsylvania to alter in any way the due process procedures in effect which resulted in the deprivation of Respondent-Muth's procedural due process rights. Pennsylvania could continue to require its school districts and intermediate units to follow the due process procedures established by the state despite a declaration by this or any other federal court, that such procedures violate the terms of the EHA. The local school districts would therefore be placed in a "Catch-22" situation. An appeal to the Secretary of Education would be disallowed by federal court decisions and the taking of such an appeal could result in the imposition of damages against the local district. Failure to take such an appeal to the Secretary of Education would be a failure to exhaust the administrative procedure provided by the

Pennsylvania Code. Moreover, the refusal of a local school district to follow the procedures mandated by the Pennsylvania statute could result in the denial of special education funding by the State. Surely, Congress did not envision this result when it enacted the EHA. Congress' unmistakable and unequivocal intention was to allow the federal courts to be the final arbiters of questions arising under the provisions of the EHA and to allow the federal courts to fashion "the appropriate relief", including the imposition of money damages against a state, that was within its power under Section 5 of the Fourteenth Amendment.

II. EVEN IF THE PENNSYLVANIA SECRETARY OF EDUCATION'S REVIEW OF THE DECISION OF THE DUE PROCESS HEARING OFFICER VIOLATED RESPONDENT'S PROCEDURAL DUE PROCESS RIGHTS, AN AWARD OF DAMAGES OTHER THAN NOMINAL DAMAGES WAS NOT APPROPRIATE.

A. Factual and Procedural Background.

Respondent-School District incorporates by reference the arguments of petitioner set forth in its brief and supports the conclusion of petitioner that the Pennsylvania Secretary of Education's review of the decision of the due process hearing officer did not violate the provisions of the EHA. The damage award must therefore be vacated in its entirety.

Assuming arguendo, that this Court finds that the Pennsylvania Secretary of Education was an improper review officer under the procedural due process scheme incorporated into the EHA, 20 U.S.C. Section 1415, the Court of Appeals and District Court below erred in awarding tuition reimbursement to Respondent-

Muth for the procedural due process violation. A brief review of the facts of this case is appropriate at this juncture.

Alexander, a child with a learning disability, began attending school in the Central Bucks School District in 1980. He was placed in a class for learning disabled children and individualized educational program plans (hereinafter "IEP") were developed and implemented with the approval of the parent for several years. In 1983, however, Alexander began expressing a desire to be placed in regular classes rather than in classes for learning disabled students. At the parent's request, the School District agreed to mainstream Alexander for English and Science on a trial basis beginning in March, 1983, but, when it became clear to the School District that Alexander was not succeeding in the mainstreaming program, the School District called an IEP conference on June 17, 1983. At that time, the School District recommended that Alexander

be returned to the more restrictive setting of the learning disabilities classroom for all of his substantive subjects. The School District proposed to prepare a new IEP for Alexander and to implement that IEP during the 1983-84 school year, Muth vs. Smith, 839 F.2d 113, 117 (3d Cir. 1988). Only three days after the School District recommended that Alexander's placement and IEP be changed, the parent requested a due process hearing and further requested that no change be made in Alexander's program until such a hearing had been held, Id. at page 117, n.4; Muth v. Smith, Finding of Fact No. 30, Opinion of Huyett, J., Aug. 28, 1986, Pet. p. 112a. As the Court of Appeals noted, "such a request from a parent is a legal bar against any change in the child's placement under 22 Pa. Code Section 13.32(22). Pennsylvania law is required to include this provision by 20 U.S.C. Section 1415(e)(3) and 34 C.F.R. Section 300.513(a). The School District therefore refrained from revising Alexander's IEP to reflect the June,

1983 recommendations," Id. Indeed, it was unrealistic to expect the School District to revise Alexander's IEP within three days of the IEP conference of June 17, 1983.

In accordance with Pennsylvania procedure, the School District immediately requested the appointment of a hearing examiner. Because of delays caused largely, if not entirely, by Respondent-Muth, a due process hearing was not held until September 30, 1983. Id. at page 117, n.6. Prior to that time, and prior to the commencement of the 1983/84 school year, the parent decided to enroll Alexander at the Landmark School, a private school in Massachusetts for learning disabled children, Id. p.117. Thus, the parent had already unilaterally decided to remove his son from the Central Bucks School District knowing full well the recommendations that the School District had made regarding the discontinuance of the

mainstreaming program.[3]

The due process violations complained of in this case began when the October 31, 1983 decision of the Hearing Officer was appealed to the Pennsylvania Secretary of Education. The hearing officer specifically found that the mainstreaming program proposed by the March, 1983 IEP (unrevised at the parent's request and as required by 22 Pa. Code Section 13.32(22), 20 U.S.C. Section 1415(e)(3) and 34 C.F.R. Section 300.513(a)), was inadequate. That fact was undisputed by the School District, which placed

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[3]Although the program proposed by the School District in June of 1983 was more restrictive than the mainstreaming program implemented in March, 1983, placement of Alexander at the Landmark School in Massachusetts was more restrictive still. Landmark School is a school exclusively for learning disabled children with no opportunity for mainstreaming into classes with regular education students. It is a residential facility with little or no opportunity for interaction between regular education students and the community at large and the learning disabled children. Muth vs. Smith, Finding of Fact No. 51, Opinion of Huyett J., Aug. 28, 1986, Pet. 128a.

into evidence the recommendations made in June, 1983, Muth vs. Smith, 839 F.2d 113, 118 (3d Cir. 1988). On appeal to the Secretary of Education, the Secretary, recognizing that the School District's June, 1983 recommendations could not have been incorporated into an IEP pending resolution of the parent's complaint, ordered the preparation of a new IEP which codified the recommendations made by the School District. The new IEP was presented to the Hearing Officer on June 7, 1984 and was ultimately determined to propose an appropriate program of education for Alexander.

Prior to the second due process hearing of June 7, 1984, this federal lawsuit was filed by Respondent-Muth. At trial, before the Honorable Daniel J. Huyett, III, the School District presented the 1983/84 IEP which embodied the June, 1983 recommendations discontinuing the mainstreaming for Alexander. The IEP was upheld by the District Court as proposing an appropriate program of education for the 1983/84

school year and was approved by the Third Circuit Court of Appeals as well. However, it was determined by the lower courts that Pennsylvania's Secretary of Education should not have reviewed the decision of the Hearing Officer and that therefore, Respondent-Muth's due process rights under the EHA had been violated. As compensation for this procedural due process violation, the court awarded damages against both the School District and the Commonwealth of Pennsylvania. Despite the fact that there was no evidence on the record of any harm caused to Respondent-Muth by the procedural due process violations, the District Court awarded one year's tuition reimbursement.

B. Legal Standards for Recovery of Damages.

In Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978), this Court delineated the prerequisites for recovery of

damages for procedural due process violations. That case, although discussing a violation of 42 U.S.C. Section 1983, provides the criteria which must be met before more than nominal damages are awarded for procedural due process violations. As Justice Powell, writing for the Court, stated:

> Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principal of damages in anglo-american law is that of compensation for the injury caused to plaintiff by defendants breach of duty.' 2 F. Harper and F. James Law of Torts Section 25.1, page 1299 (1956). The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available under that Section for actions 'found to have been violative of ... CONSTITUTIONAL RIGHTS AND TO HAVE CAUSED COMPENSABLE INJURY ...' Wood vs. Strickland, 420 U.S., at 319, 95 S.Ct., at 999 (emphasis supplied by Court); (remaining citations omitted).

Carey, Id. at page 254-255. The court in Carey, rejected the argument that substantial damages should be awarded whether or not any injury was caused by a procedural due process deprivation

and dismissed the argument that a due process violation should be presumed to cause injury thus relieving a plaintiff from the necessity of proving actual harm. Id. at page 262. The Court held that plaintiff would be entitled to recover nominal damages (in Carey, the sum of $1.00), without proof of actual injury, but concluded that "substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights, Id. at 266.

C. Application to the instant case.

In the instant case, there was absolutely no testimony on the record from Respondent-Muth at any time during the course of the proceedings which could fairly be characterized as proof of actual damage suffered as a result of the procedural due process violations found by the Court. Nor was any evidence presented to

justify an award of punitive or exemplary damages. The lower courts justified the award of damages against the Commonwealth of Pennsylvania by concluding that if the due process procedure had not taken over one year, the parent could have reevaluated his decision to place Alexander at the Landmark School at his own expense. In drawing this conclusion, the lower courts presumed that actual injury occurred without requiring Respondent-Muth to produce testimony regarding the placement of his son at the Landmark School. Not only is such a conclusion unsupported by the evidence before the District Court, but the Court of Appeals ignored the fact that the parent had unilaterally removed his son from the School District prior to the first due process hearing. Moreover, after the School District's IEP for the 1983/84 school year had been approved by the Hearing Officer and Secretary of Education, the parent continued the Landmark School placement throughout the following year. The Court of

Appeals found that at least three months' delay in the due process hearing schedule was due largely, if not entirely, to the parent's own request for postponements, Muth vs. Smith, 839 F.2d 113, 117 (3d Cir. 1988). Moreover, the imposition of the damage award totally ignored the fact that at all times, the Central Bucks School District had available an appropriate program of education for this child.

The Court of Appeals' justification for imposition of a damage award against the Respondent-District is even more difficult to understand. The Third Circuit concluded that an award of damages was appropriate against the School District because the IEP to which Respondent-Muth objected was found by the Hearing Officer to be inadequate. Such a conclusion is totally inconsistent with the facts. Respondent-Muth approved the March, 1983 IEP. Only after the District proposed to change the March, 1983 IEP and recommended Alexander's return to the resource room for all substantive

subjects, did Mr. Muth register a complaint and request a due process hearing. Thus, it was not the March, 1983 IEP that was challenged, but rather the recommendations made by the District in June, 1983 that the placement and program be changed. As stated previously, the District was prohibited from codifying its June, 1983 recommendations into an IEP until such time as directed by the Secretary of Education, 22 Pa. Code Section 13.32(22), 20 U.S.C. Section 1415(e)(3); 34 C.F.R. Section 300.513(a). In June, 1983, Respondent-Muth knew what the recommendations for the program and placement of his son for the 1983/84 school year would be, having met with the multi-disciplinary team to address specifically the District's concerns over Alexander's participation in the mainstreamed classes. Neither the Hearing Officer, the Secretary of Education, the District Court nor Court of Appeals determined that the recommendations first made to the parent in June, 1983 proposed an inappropriate

or inadequate program of education. On the contrary, those recommendations, which were ultimately embodied in an IEP, have been upheld throughout the course of these proceedings. Moreover, there is no testimony on the record from Respondent-Muth to suggest that the IEP to which he objected was the March, 1983 IEP. On the contrary, all of the evidence supports the conclusion that revision of the March, 1983 IEP was the subject of Muth's objections. Indeed, it was Muth himself who demanded that the March, 1983 IEP remain unrevised, Muth vs. Smith, 839 F.2d 113, 117 (3d Cir. 1988).

It is abundantly clear from the record that there is no justification for the award of damages against the School District. There was no testimony presented by Muth from which the Court could conclude that the removal of Alexander from the Central Bucks School District and his placement into the Landmark School program was in any way caused by any action or inaction on the part of the School District.

Nor was there testimony as to why Muth removed his son from the School District program. In the absence of such testimony, and in the absence of any proof of actual damage, only nominal damges may be awarded for a procedural due process violation, and those damages are appropriately assessed against the entity which caused the deprivation, in this case, the Commonwealth of Pennsylvania, Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 52 (1978).

While tuition reimbursement has been determined to be appropriate where procedural due process violations have been found, damages have been assessed only against the entities actually responsible for causing the harm, Carey, Id., Hall v. Vance, 774 F.2d 629 (4th Cir. 1985); McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985). Although in some cases a procedural due process violation might act to invalidate an otherwise appropriate IEP, the facts of each case must be closely scrutinized

to determine the nature and scope of the procedural due process violation, the harm to the plaintiff, and the identity of the party causing the harm, Burlington School Committee of the Town of Burlington vs. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985); Cain vs. Yukon Public Schools, 775 F.2d 15 (10th Cir. 1985). Where the School District is found to have deprived a parent of procedural due process rights, invalidation of an IEP may be appropriate. However, in the case at bar, there is no evidence that the District acted to deprive Respondent-Muth of his procedural due process rights. If any deprivation of procedural due process rights occurred in this case, it was the result of an invalid statutory scheme enacted by the Pennsylvania Legislature and followed by the School District as required by State Law. There is no evidence on the record to suggest that the School District was responsible for the flawed due process system. Requiring the School

District to compensate Respondent-Muth for a procedural due process violation it did not cause, is an unjust result and not one contemplated by the Court in Burlington or by Congress in enacting the EHA, see also Rose vs. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, 474 U.S. 817 (1985) (holding no attorney's fee award should be made against School District where plaintiff prevailed because state administrative process conflicted with federal law).

Thus, in the absence of any justification for the imposition of damages against the School District, the damage award must be vacated as to the School District.

CONCLUSION

For the foregoing reasons, Respondent-Central Bucks School District respectfully requests the Court to vacate the judgment of the Court of Appeals entered against it.

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